FROM THE GROUND UP: THE FUNDAMENTALS OF PRACTICE IN THE D.C. COURT OF APPEALS

By David Tedhams[1]

I. Jurisdiction.

A. The Court has jurisdiction over "all final orders and judgments of the Superior Court," D.C. Code § 11-721 (a)(1) (2001), and any final "order or decision of the Mayor or an agency in a contested case." D.C. Code § 2-510 (a) (2001).

1. Who may appeal?

a. Any person who is "aggrieved" by a final order or judgment of the Superior Court. *In re: C.T.*, 724 A.2d 590, 595 (D.C. 1999).

b. Any person who has suffered a legal wrong or been adversely affected or "aggrieved" by an order or decision of an agency in a contested case. D.C. Code § 2-510 (a) (2001).

i. A person is "aggrieved," if their "legal rights have been infringed or denied" by the Superior Court's order, *In re: C.T.*, 724 A.2d at 595, or "[if they have] suffered or will sustain some actual or threatened 'injury in fact' from the challenged agency action." *District Intown Prop., Ltd. v. District of Columbia Dep't of Consumer & Regulatory Affairs*, 680 A.2d 1373, 1377 (D.C. 1996).

c. Anyone "who voted in an election" may petition the Court for review and ask that it "set aside the results . . . and declare the true results[,]" or that it void the election in whole or part. D.C. Code § 1-1001.11 (b) (2001).

i. But the petition must contain a concise statement of claims and must identify facts showing an entitlement to relief, general allegations of dissatisfaction with the results are not sufficient to involve the Court. *Jackson v. District of Columbia Bd. of Elections & Ethics*, 770 A.2d 79 (D.C. 2001); *accord*, *Scolaro v. District of Columbia Bd. of Elections & Ethics*, 717 A.2d 891, 893

---

[1] Deputy Staff Counsel, D.C. Court of Appeals.

(D.C. 1998).

d. Any qualified voter who challenged a nominating petition, or any person named in the challenged petition as a nominee, may appeal a Board of Elections decision with respect to the challenge. *See id.* at § 1-1001.08 (o)(2) (2001).

2. What is a "final" order?

a. An order is final only if it disposes of the whole case on the merits, so that the trial court has nothing else to do but execute the judgment already rendered. *In re Estate of Chuong*, 623 A.2d 1154, 1157 (D.C. 1993) (en banc) (citations omitted).

b. A final order is **NOT**:

i. A pretrial discovery order. *Crane v. Crane*, 657 A.2d 312, 315 (D.C. 1995); *Scott v. Jackson*, 596 A.2d 523, 527 (D.C. 1991); *Horton v. United States*, 591 A.2d 1280, 1282 (D.C. 1991); *United States v. Harrod*, 428 A.2d 30, 31 (D.C. 1981) (en banc). Unless, it is directed to a disinterested 3rd party. *Walter E. Lynch & Co. v. Fuisz*, 862 A.2d 929 (D.C. 2004).

ii. A contempt order unless sanctions have actually been imposed. *Crane v. Crane*, 614 A.2d 935, 939 (D.C. 1992); *Beckwith v. Beckwith*, 379 A.2d 955, 958 (D.C. 1977), *cert. denied*, 436 U.S. 907 (1978).

iii. An order which does anything less than completely terminate a parent's rights with respect to their children. *In re: K.M.T.*, 795 A.2d 688 (D.C. 2002); *In re: S.J.*, 772 A.2d 247, 248 (D.C. 2001); *In re S.G.*, 663 A.2d 1215 (D.C. 1995); *In re: A.H.*, 590 A.2d 123 (D.C. 1991).

iv. An order which is issued before the prescribed administrative remedy has been exhausted. *District of Columbia v. Group Ins. Admin.*, 633 A.2d 2, 20 (D.C. 1993); *Bender v. Dep't of Employment Serv.*, 562 A.2d 1205, 1208 (D.C. 1989).

v. An order which has been issued by a Magistrate Judge, *a.k.a.,* a Hearing Commissioner. D.C. Code § 11-1732 (k) (2001). These orders do not become final for the purposes of appeal until after they have been reviewed by an Associate Judge of the Superior Court. *Id*. *See also* Super. Ct. Civ. R. 73 (b); *Bratcher v. United States*, 604 A.2d 858 (D.C. 1992); *Arlt v. United States*, 562 A.2d 633 (D.C. 1989).

vi. An order which leaves any cause of action unresolved against any party. *West v. Morris*, 711 A.2d 1269, 1271 (D.C. 1998); *Paden v. Galloway*, 550 A.2d 1128 (D.C. 1988); *Dyhouse v. Baylor*, 455 A.2d 900 (D.C. 1983).

3. What is a "contested case?"

a. A contested case is a proceeding in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after a hearing. D.C. Code § 2-502 (8) (2001); *Richard Milburn Pub. Charter Alt. High School v. Cafritz*, 798 A.2d 531 (D.C. 2002); *Singleton v. District of Columbia Dep't of Corrections*, 596 A.2d 56 (D.C. 1991); *Chevy Chase Citizen's Assoc. v. District of Columbia Council*, 327 A.2d 310 (D.C. 1974) (en banc). Moreover, the hearing must be a "trial-type" adjudicative proceeding which affects the interests of specific parties, not a rule-making proceeding.

b. A contested case does **NOT** include:

i. Any matter subject to a subsequent trial *de novo*. D.C. Code § 2-502 (8)(a) (2001).

ii. Any matter involving the selection or tenure of a District officer or employee. *See id.* at § 2-502 (8)(b).

iii. Any proceeding in which decisions rest solely on inspections, tests or elections. *See id.* at § 2-502 (8)(c).

iv. Any case where the Mayor or an agency acts as an agent

or court for the District. *See id.* at § 2-502 (8)(d).

4. When do I appeal?

   a. In civil or criminal proceedings the appeal must be taken within 30 days from the date the order or judgment is entered on the docket of the Superior Court unless a different time frame is specified by the D.C. Code. *See* D.C. App. R. 4 (a)(1) and R. 4 (b)(1).

   b. In agency proceedings the petition for review must be filed within 30 days after notice is given in conformance with the agency's rules. *See* D.C. App. R. 15 (a)(2). **Exceptions:**

      i. A contractor may appeal a decision of the Contract Appeals Board within 120 days, *see* D.C. Code § 2-309.05 (a) (2001), and

      ii. Public Service Commission orders denying reconsideration may be appealed within 60 days. *See id.* § 34-605 (a).

      iii. Decisions by the Board of Appeals and Review in litter control cases must be taken within **15 days.** *See id.* § 8-809 (b).

   c. Any challenge to the results of an election must be brought within 7 days after the Board of Elections & Ethics certifies the results. *See id*. at § 1-1001.11 (b). Any challenge to the Board's determination with respect to the validity of a nominating petition must be brought within 3 days after announcement of the determination. *See id*. at § 1-1001.08 (o)(2).

   d. But regardless of the type of proceeding, the time period is jurisdictional and the Court will not hear an appeal filed after it has expired. *See, e.g., In re C.I.T.*, 369 A.2d 171 (D.C. 1977) (civil appeals); *United States v. Jones*, 423 A.2d 193, 196 (D.C. 1980) (criminal appeals); *Flores v. District of Columbia Rental Housing Comm'n*, 547 A.2d 1000 (D.C. 1988), *cert. denied*,

490 U.S. 1081 (1989) (agency proceedings).

i. **Exceptions**: Certain post-trial motions will toll the time for noting an appeal until after they have been acted upon. *See* D.C. App. R. 4 (a)(4), 4 (b)(3). Take care, however, to see that the motion itself is timely or it may not toll the appeal time. *Vincent v. Anderson*, 621 A.2d 367, 370 (D.C. 1993); *but see Affordable Elegance Travel, Inc. v. Worldspan L.P.*, 774 A.2d 320, 330-32 (D.C. 2001) (discussing exceptions). Tolling motions include:

A. A motion for judgment notwithstanding the verdict, *a.k.a.* a motion for judgment as a matter of law, under Super. Ct. Civ. R. 50 (b).

B. A motion to amend or make additional findings of fact under Super. Ct. Civ. R. 52 (b).

C. A motion for "reconsideration," *a.k.a.* a motion to vacate alter or amend the judgment, under Super. Ct. Civ. R. 59 (e). Do not confuse this with a motion for relief from judgment under Super. Ct. Civ. R. 60 (b). Rule 60 motions will not stop the appeal clock. *See Fleming v. District of Columbia*, 633 A.2d 846, 848-49 (D.C. 1993).

D. A motion for new trial under Super. Ct. Civ. R. 59 (b).

E. A motion for judgment of acquittal under Super. Ct. Crim. R. 29.

E. A motion in arrest of judgment under Super. Ct. Crim. R. 34.

F. A motion for new trial on grounds other than newly discovered evidence under Super. Ct. Crim. R. 33.

G. A motion for new trial based on newly discovered evidence under Super. Ct. Crim. R. 33 which is filed within 30 days of the judgment.

B. In two situations the Court's review is discretionary and must be sought by filing an Application for Allowance of Appeal ("AAA"). They are: 1) judgments of the Small Claims Branch, and 2) judgments in criminal cases where the potential penalty is up to 1 year of imprisonment, and/or a fine of up to $1,000, but where the defendant has only actually been fined $50 or less. D.C. Code § 11-721 (c), § 17-301 (b) (2001); D.C. App. R. 6.

1. Since Small Claims proceedings are frequently heard by Magistrate Judges, it's important to remember the decision is not final until after it has been reviewed (within 10 days *see* Super. Ct. Civ. R. 73 (c)) by an Associate Judge. *See* § I (A)(2)(b)(v), *supra*.

2. The time frame for filing an AAA is very short, it must be filed within 3 days of the Superior Court's order. *See* D.C. Code § 17-307 (b) (2001); D.C. App. R. 6 (a)(2). Trial judges occasionally misinstruct the parties on this point and tell them they have 30 days.

3. An AAA will be granted if one judge of the Court believes that it should be; otherwise, it will be denied and the denial acts as an affirmance of the lower court's decision. D.C. Code § 17-301 (b) (2001).

4. The Court will not grant an AAA unless the applicant can demonstrate "apparent error or a question of law, which has not been, but should be decided by th[e] court." *Karath v. Generalis*, 277 A.2d 650, 651 (D.C. 1971).

C. The Court also has jurisdiction over certain interlocutory matters.

1. **By statute** it may review non-final orders of the Superior Court which:

a. Grant, continue, modify, refuse, or dissolve an injunction, or which refuse to dissolve or modify an injunction. *See* D.C. Code § 11-721 (a)(2)(A) (2001).

b. Appoint receivers, guardians, or conservators, or which refuse

to wind up receiverships, guardianships, or the administration of conservators or take steps to accomplish their purpose. *See id*. at § 11-721 (a)(2)(B).

c. Change or affect the possession of property. *See id*. at § 11-721 (a)(2)(C).

   i. This does not apply to orders which involve the exchange of money. *See Dameron v. Capitol House Assoc., Ltd.*, 431 A.2d 580, 587 (D.C. 1981); *accord, Hagner Mgm't Corp. v. Lawson*, 534 A.2d 343, 345 (D.C. 1987).

   ii. The key question is whether the order changes the *status quo* with respect to the property. *See Bowie v. Nicholson*, 705 A.2d 290 (D.C. 1998); *Williams v. Dudley Trust Found.*, 675 A.2d 45, 51 (D.C. 1996).

d. Detain an individual pending trial or appeal in criminal cases. *See* D.C. Code § 23-1324 (2001).

e. Detain or place a child in shelter care, or which transfers them for criminal prosecution. *See id*. at §16-2328 (a) (2001).

   i. As with AAAs, the time for bringing an appeal from these juvenile detention or transfer orders is shortened. The notice must be filed <u>within 2 days</u> of the date of entry. *Id*. But once it is timely filed, the Court must expedite the case and hear argument within three days of the notice (Sundays excluded). *See id*. at § 16-2328 (b).

f. Directs the United States or the District of Columbia to return seized property, suppresses evidence, or otherwise denies the prosecutor the use of evidence at trial. *See id*. at § 23-104.

g. Directs that someone be extradited. *See id*. at § 23-704 (e).

   i. Again, the time frame is shortened. This order must be appealed within 24 hours. *Id*. (And move for an immediate stay).

h. Dismiss an indictment or information, or otherwise terminate prosecution in favor of the defendant (short of acquittal). *See id*. at §§ 23-104 (c), 11-721 (a)(3).

i. Determine that a person is not subject to penalty enhancements. *See id*. at §§ 23-111 (d)(2), 11-721 (a)(3).

j. Determine any appeal or decision of the Public Service Commission. *See id*. at § 34-605 (a).

    i. Here, as noted, the time for taking an appeal is expanded to 60 days.

k. The trial court has certified as presenting a controlling question of law as to which there is a substantial ground for a difference of opinion, and for which an immediate appeal may materially advance the ultimate termination of the litigation or case. D.C. Code § 11-721 (d) (2001).

    i. Review under this section is reserved for exceptional cases and the statute is not "intended merely to provide (interlocutory) review of difficult rulings in hard cases." *Plunkett v. Gill*, 287 A.2d 543, 545 (D.C. 1972); *Medlantic Health Care Group, Inc. v. Cunningham*, 755 A.2d 1032 (D.C. 2000).

    ii. The trial court's certification does not guarantee review and the Court will deny the application – an AAA is the means for seeking review – if it concludes the case was improvidently certified. *In re: J.A.P.*, 749 A.2d 715, 716 (D.C. 2000).

    iii. The Court has never specifically required the trial court to articulate detailed reasons for certifying an order under this section, but it has intimated that something more than a bare quotation of the statutory language is required. *See id.*, 749 A.2d at 717.

    iv. The time for taking an appeal is shortened to 10 days.

2. The only **non-statutory exception** to the finality rule "unequivocally recognized" by the Court is the **collateral order doctrine**. *Meyers v. United States*, 730 A.2d 155, 156 (D.C. 1999). It is a very narrow exception which applies to interlocutory orders that have a final and irreparable effect on an important right of the parties. *Bible Way Church v. Beard*, 680 A.2d 419, 425 (D.C. 1996).

   a. To be collaterally appealable, an order must 1) conclusively resolve an important and disputed question, 2) which is completely separate from the merits of the action, and 3) is effectively unreviewable on appeal from a final judgment. *Id.* at 425-26. **All parts** of this test must be met, before the Court will take jurisdiction.

   b. Orders appealable under the collateral order doctrine have included denials of claims of immunity, *see Bible Way, supra*; *United Methodist Church v. White*, 571 A.2d 790 (D.C. 1990), denials of motions to dismiss an indictment based on double jeopardy grounds, *Young v. United States*, 745 A.2d 943, 945 (D.C. 2000), and denials of motions to intervene as of right, *Calvin-Humphrey v. District of Columbia*, 340 A.2d 795, 798 (D.C. 1975).

      ii. Denials of motions to dismiss based on *forum non conveniens* were once included in this category. *See Frost v. Peoples Drug Store*, 327 A.2d 810, 812 (D.C. 1974), but the court has since overruled *Frost*. *See Rolinski v. Lewis*, 828 A.2d 739 (D.C. 2003) (en banc).

   c. It also appears that an order which completely denies a parent's right to visitation is interlocutorily appealable; however, the Court has not directly held that the collateral order doctrine applies. *See, e.g., In re: D.M.*, 771 A.2d 360 (D.C. 2001).

D. Extraordinary writs (mandamus or prohibition)

1. A petition for writ of mandamus may be filed in cases "where a trial court has refused to exercise or has exceeded its jurisdiction," or similarly, when a government official has refused to exercise their authority or has exceeded their authority. *See Banov v. Kennedy*, 694

A.2d 850, 857 (D.C. 1996); *United States v. Harrod*, 428 A.2d 30 (D.C. 1981) (en banc); *United States v. Braman*, 327 A.2d 530 (D.C. 1974), *cert. denied*, 423 U.S. 1032 (1975).

a. It is questionable whether the Court may issue the writ to a federal official. *See M'Clung v. Silliman*, 19 U.S. (6 Wheat.) 598 (1821). *But see Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838).

2. Mandamus is NOT a substitute for appeal. *Banov, supra*, 694 A.2d at 857.

3. The petitioner must show that their right to the writ is clear and indisputable, and that they have no other adequate means of obtaining relief. *Id*.

4. If the Court is of the opinion that the writ should not be granted, it will deny the petition; otherwise, it will hold the petition in abeyance and order the respondent(s) to file an answer. D.C. App. R. 21 (b)(1). However, the Court is typically reluctant to actually issue the writ and if the respondent's answer is unsatisfactory, it usually issues an opinion or memorandum order (with a certified copy to the offending official or entity) explaining why mandamus is appropriate. *See Anderson v. Sorrell*, 481 A.2d 766 (D.C. 1984); *Bowman v. United States*, 412 A.2d 10 (D.C. 1980).

II. Emergencies & Expedited Matters.

A. Stays.

1. Successfully noting an appeal does not mean that you've stopped any proceeding below, or stayed enforcement of any order or judgment. You must seek a stay if you want to preserve the *status quo* pending appeal.

a. Juvenile interlocutory appeals under D.C. Code §16-2328 (2001) are the single exception to this rule and an interlocutory appeal brought under that provision will automatically stay criminal proceedings so that the child is not transferred. *See id*. at § 16-2328 (c).

2. A stay must first be sought from the trial court or agency, or the movant must show that seeking it from those entities is impracticable. D.C. App. R. 8 (a), 18 (a). This rule is strictly construed. *See Horton v. United States*, 591 A.2d 1280 (D.C. 1991).

3. If the record has not been filed then attach a copy of the order to be stayed and any relevant record material. D.C. App. R. 8 (a)(2)(B).

4. To obtain a stay pending appeal the movant must show: 1) a likelihood of success on the merits, 2) that irreparable harm will result if a stay is not entered, 3) that the nonmoving party will not be harmed (or will suffer less harm), and 4) that the public interest favors granting the stay. *See Barry v. Washington Post Co*., 529 A.2d 319, 321 (D.C. 1987). When the last three factors have been met, only a "substantial" showing of likelihood of success on the merits is necessary for the Court to grant a stay. *Id*. The required degree of possible or likely success will vary according to the court's assessment of the other stay factors and an order maintaining the *status quo* may be appropriate where a serious legal question is presented, where the movant will otherwise suffer irreparable injury, and when there is little risk of harm to the other parties or to the public interest. *Walter E. Lynch & Co. v. Fuisz*, 862 A.2d 929 (D.C. 2004).

5. A stay may be conditioned on the posting of a supersedeas bond. D.C. App. R. 8 (b), 18 (b).

6. **Tips:**

   a. File sooner rather than later: don't wait until the marshals are on their way to evict your client.

   b. Contact the Clerk's office to notify it of a pending emergency or expedited request to stay.

   c. Address the standard, don't just whine about the grievous injustice done to your client by the trial judge or the other side.

   d. Economic loss is not irreparable harm, *see District of Columbia v. Group Ins. Admin.*, 633 A.2d 2, 23 (D.C. 1993), nor are the ordinary incidents of litigation, *i.e.*, time and money. *See*

Hercules & Co., Ltd. v. Shama Restaurant Corp., 566 A.2d 31, 37-38 (D.C. 1989).

e. If you want the Court to expedite consideration of your motion, then serve your opponent personally. D.C. App. R. 8 (a)(2)(C).

B. Release in criminal cases.

1. A person who has been detained pending trial or sentencing may take an immediate appeal from the detention order, D.C. Code §§ 23-1324, 23-1325 (b), 23-1325 (d) (2001), and the Court will generally resolve the appeal by cross-motions for summary disposition. *See Martin v. United States*, 614 A.2d 51, 53 (D.C. 1992); D.C. App. R. 9 (a).

2. Persons who are detained pending appeal may also seek review of the detention order, D.C. Code §§ 23-1324, 23-1325 (c)-(d) (2001), but should do so by motion in their existing appeal rather than by filing a separate appeal. D.C. App. R. 9 (b).

3. Detention matters are expedited. D.C. Code § 23-1324 (b) (2001); D.C. App. R. 4 (c), 9.

4. The order under review must be attached to the motion as must an affidavit addressing all of the points enumerated in Form 6 of the Court's rules. D.C. App. R. 9.

5. Have the transcript prepared and transmitted ASAP (especially if there's no written order). This means either ordering the transcript on an expedited basis or requesting that the voucher authorize expedited preparation in CJA cases.

6. **Tips**:

a. There are several standards at play, and again, it is important to save the rhetoric and address each standard.

i. A motion for summary disposition must show that the facts are uncomplicated and undisputed, and that the lower court's ruling rests on a narrow and clear-cut issue of law. *Oliver T. Carr Mgm't, Inc. v. Nat'l Delicatessen,*

Inc., 397 A.2d 914, 915 (D.C. 1979). The movant "has the heavy burden of demonstrating both that his remedy is proper and that the merits of his claim so clearly warrant relief as to justify expedited action." *Id*.

ii. In the pretrial detention context, liberty is the norm unless the trial judge finds probable cause to believe that a person has committed a crime of violence or a dangerous crime, and finds by clear and convincing evidence that no condition or combination of conditions will reasonably assure that person's appearance in court, or the safety of any other person or the community. D.C. Code § 23-1322 (b)(2) (2001). The judge must also take a laundry list of other factors into consideration. *See id*. at § 23-1322 (e).

iii. A person who has been convicted and is awaiting sentence, or whose appeal is pending, will be detained unless [the trial judge] finds by clear and convincing evidence that he is not likely to flee or pose a danger to any other person or to the property of others." D.C. Code § 23-1325 (2001). But since a finding of guilt has been made, detention is the norm unless the trial court finds, by clear and convincing evidence, that exceptional circumstances justify a departure from the norm. *See Ibn-Tamas v. United States*, 368 A.2d 520, 521 (D.C. 1977).

iv. But whatever the standard, the Court's review is deferential to the trial court's findings and it will not substitute its assessment of dangerousness or risk of flight. *Pope v. United States*, 739 A.2d 819, 824 (D.C. 1999).

III. Practice Pointers.

A. Filing a Notice of Appeal (civil and criminal cases) or a Petition for Review (agency cases).

1. A notice of appeal is filed with the Clerk of the Superior Court, D.C.

App. R. 3(a), 4 (a)(1), (b)(1), but petitions for review and applications for allowance of appeal are filed with the Court of Appeals. *See id.* at R. 6 (a), 15 (a).

2. Each must specify the party or parties taking the appeal, and must designate the judgment or order(s) to be reviewed. D.C. App. R. 3 (c), 15 (a)(3).

3. Each must be signed by the appellant or their counsel. *Id.* If any party is not an individual person, it must be represented by counsel.

4. The Clerk of the Superior Court serves the notice on the other parties, and the Clerk of the Court of Appeals serves the petition. D.C. App. R. 3 (d), 15 (c).

B. Record preparation.

1. The record consists of the original papers and exhibits filed in the Superior Court, any transcripts, and a certified copy of the docket entries which is prepared by the Clerk of that court. *See* D.C. App. R. 10 (a).

2. Within 10 days after filing the notice of appeal, a civil appellant must either order the parts of the transcript they consider necessary or file a certificate stating that no transcript will be ordered. *See id.* at R. 10 (b)(1).

a. Unless the entire transcript is ordered the appellant must, within the same 10 days, file a statement of issues to be presented on appeal and serve a copy as well as a copy of the transcript order or certificate on all other parties. *See id*. at R. 10 (b)(3).

i. If another party considers additional transcript is necessary, they may designate the additional parts to be ordered within 10 days after receiving the appellant's transcript order or certificate and statement of the issues. *See id*.

ii. If the appellant fails to order the additional transcript within 10 more days, the designating party may either

order those parts or move the Superior Court for an order requiring the appellant to do so. *See id*.

b. In criminal and juvenile cases, where counsel has been appointed under the Criminal Justice Act, the transcripts are prepared automatically and no order is required. *See id*. at R. 10 (b)(5)(B) But if pretrial proceeding transcripts (other than hearings on motions to suppress) are needed, a motion for their preparation must be approved by the trial judge. *See id*.; *Gaskins v. United States*, 265 A.2d 589 (D.C. 1970). A party proceeding *in forma pauperis* in a civil case must also file a motion in the Superior Court for the preparation of transcripts without costs. *See* R. 10 (b)(5)(A); *Hancock v. Mutual of Omaha Insur. Co.*, 472 A.2d 867 (D.C. 1984). In CCAN cases, counsel must secure vouchers from the finance office, complete them, and submit them to the trial judge for approval. *See* R. 10 (b)(5)(C).

c. The appellant must make arrangements for payment of the transcripts at the time they are ordered. *See id.* at R. 10 (b)(4).

4. "While it is primarily appellant's burden to provide an adequate record, our appellate rules explicitly impose upon appellees the duty of designating additional portions of the transcript which they deem necessary . . . . [A]n appellees' duty [is] to assure that information helpful to his or her cause is not omitted." *Sterling Mirror, Inc. v. Gordon*, 619 A.2d 64, 69 (D.C. 1993).

C. Motions.

1. The parties must seek each other's consent before filing non-dispositive procedural motions. D.C. App. R. 27 (b)(4).

2. A response to a motion may be filed within 7 calendar days of service, and a reply 3 days thereafter. *See id*. at R. 27 (a)(4)-(5). A reply may not present matters that do not relate to the response. *See id*. at R. 27 (a)(5).

3. Motions for summary affirmance or reversal will automatically stay the briefing schedule unless otherwise ordered by the Court. *See id*. at R.

27 (c). A cross-motion for summary disposition may be filed in lieu of a response, and if counsel deems it appropriate, a statement may be included in either the motion or responsive pleading indicating that it may be treated as the party's brief on the merits if the Court denies the motion or defers consideration on the merits. *See id*.

4. A motion or response may not exceed 20 pages, and a reply may not exceed 10 pages. *See id*. at R. 27 (d)(2).

D. Computing time.

1. In computing time under the Court's rules or the applicable statutes, do not include the day of the triggering event or act. Start counting from the next day and do not include intervening weekends and legal holidays when the relevant time period is less than 11days. D.C. App. R. 26 (a). Intervening weekend and legal holidays are included, however, if a statute or order expressly provides for their inclusion or when the relevant period is stated in *calendar* days. *See id.* at R. 26 (a)(2). If the last day is a Saturday, Sunday, a legal holiday, or a day on which the weather or other conditions cause the Clerk's office to be closed, the due date becomes the next business day. *See id*. at R. 26 (a)(3).

2. If a party is required or permitted to act with a certain time after a paper is served on them, 5 calendar days are added to the prescribed period unless the paper is delivered on the date stated in the proof of service. *See id.* at R. 26 (c). This provision does not apply to orders of the Court which prescribe a period of time in which a party is permitted to act.

E. Briefs.

1. Appellant's brief is due 40 days after the Clerk notifies the parties that the record has been filed or, after such notice, the court has denied a motion for summary disposition. The appellee's brief is due 30 days after service of the appellant's brief and any reply is due within 21 days after the appellee's brief has been served. D.C. App. R. 31 (a)(1).

2. A brief may not exceed 50 pages and a reply brief may not exceed 20 pages. D.C. App. R. 32 (a)(6).

3. D.C. App. R. 28 (a) requires a brief to contain:

   a. A title page with the appeal number, the name of the court, the title of the case as it appears on the appellate docket, the nature of the proceeding, the name of the lower court, agency or board, the title of the brief (identifying the party or parties on whose behalf it is filed), and the name, address and phone number of counsel filing the brief. Counsel who will argue the matter must be denoted with an asterisk if more than one counsel is listed.

   b. A certificate of counsel which will enable judges of the Court to consider disqualification or recusal.

   c. A table of contents with page references.

   d. A table of cases and other authorities with an asterisk next to those chiefly relied upon.

   e. A statement of the issues.

   f. A statement of the case.

   g. A statement of the relevant facts with appropriate references to the record.

   h. An argument with citations to supporting authorities and the record.

   i. A short conclusion specifying the precise relief sought.

4. An *amicus* brief may not be filed without the consent of all parties or leave of the Court, unless it is filed by the United States, the District of Columbia, or another state. D.C. App. R. 29 (a).

5. The parties must file an appendix to their briefs which contains the relevant docket entries, pleadings, charges, findings, or opinion; the judgment, order, or decision in question; and, any other parts of the record they wish to include. D.C. App. R. 30 (a)(1).

a. The parties are to cooperate in the preparation of the appendix, and are not to include unnecessary materials unless they wish to face sanctions. *See id.* at R. 30 (b)(1).

b. The appellant is to pay for preparing the appendix except for those parts requested by another party which they consider to be unnecessary. In that case, the requesting party is to pay the cost of inclusion. Appendix costs may be recovered by the prevailing party. *See id* at R. 30 (b)(2).

c. The parties may be excused from the appendix requirement upon a showing of "good cause." *See id*. at R. 30 (e). And, an appendix is not required in cases where a party is proceeding *in forma pauperis* or where counsel has been appointed to represent a party. *See id.* at R. 30 (f). There is, however, an abbreviated "appendix" requirement for such cases. *Id*.

F. Calendaring and argument.

1. Cases on the Regular Calendar are scheduled for oral argument, and counsel is notified, about a month in advance. D.C. App. R. 33 (a). Cases on the Summary Calendar are not normally argued but a party may move for oral argument. D.C. App. R. 33 (c).

2. The appellant is entitled to open and conclude the argument. D.C. App. R. 34 (c). If there is a cross-appeal, D.C. App. R. 28 (i) determines which party is the appellant and which the appellee for purposes of oral argument. *See* D.C. App. R. 34 (d).

3. Subject to the Court's discretion, each side has 30 minutes for argument in cases on the Regular Calendar; 15 minutes for cases on the Summary Calendar; and 45 minutes for cases heard en banc. *See id*. at R. 34 (g).

4. An intervenor may not argue unless counsel on whose side the intervenor has intervened is willing to share his or her allotted time. *Id.*

G. Judgments and opinions.

1. The Clerk prepares, signs, and enters the judgment after receipt of the Court's opinion or as otherwise instructed by the Court if no opinion is issued. D.C. App. R. 36 (a). The opinion or order is then mailed to each party. D.C. App. R. 36 (b).

2. Opinions may be published or unpublished. In the case of an unpublished opinion, any interested party may move for publication within 30 days after issuance. D.C. App. R. 36 (c).

H. Petitions for rehearing or for rehearing en banc.

1. May be filed within 14 days after entry of the judgment. D.C. App. R. 35 (c), 40 (a)(1).

2. Must state with particularity the points of law or fact which the petitioner believes the Court overlooked or misapprehended. It cannot exceed 10 pages and there's no oral argument. D.C. App. R. 35 (b), 40 (a)(2), (b).

3. An answer to the petition may <u>not</u> be filed unless called for by the Court. D.C. App. R. 35, (e), 40 (a)(3).

4. En banc hearings or rehearings are not favored and will normally be ordered only when necessary to secure or maintain uniformity of the Court's decisions or when the case involves a question of exceptional importance. D.C. App. R. 35 (a).

I. Mandate.

1. The mandate issues 21 days after judgment unless a timely petition for rehearing or rehearing en banc is filed. If so, issuance is stayed until 7 days after the petition is resolved. D.C. App. R. 41 (b).

2. A party may move to stay issuance of the mandate pending application for a writ of *certiorari*. D.C. App. R. 41 (d)(2)(A). If granted, that stay is not to exceed 90 days unless good cause is shown, or a *cert.* petition is filed and a notice to that effect is received from the Clerk of the Supreme Court. *See id.* at R. 41 (d)(2)(B). In that case, the mandate will not issue until final disposition by the Supreme Court, *see id*., but, issuance will follow immediately on the denial of *cert*. *See id*.

at R. 41 (d)(2)(D).

3. A motion to recall the mandate in a criminal case because of the alleged ineffectiveness of appellate counsel must be filed within 180 days after issuance. D.C. App. R. 41 (f).

J. Fees and costs.

1. The Court does not generally award attorney's fees except in frivolous cases when they may be assessed as a sanction, *see Slater v. Biehl*, 793 A.2d 1268, 1278 (D.C. 2002), or when an appeal is taken for an improper purpose or a party fails to comply with an order of the court. D.C. App. R. 38.

2. Costs, however, are assessed against the appellant if the appeal is dismissed or the judgment is affirmed. They are assessed against the appellee if the judgment is reversed. D.C. App. R. 39 (a). Costs are assessed against the United States only if authorized by law. D.C. App. R. 39 (b).

3. Costs must be requested within 14 days from the date of decision. D.C. App. R. 39 (d).

4. Costs include filing fees, transcript costs, copying, postage, and messenger costs. D.C. App. R. 39 (d)(1).